IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-1427

PAUL A. McDANIEL,
Appellant,

vs.

SELMA CASH PATY, et al.,
Appellees.

On Appeal from the Supreme Court of the State of Tennessee

MOTION OF APPELLEE, SELMA CASH PATY, TO DISMISS APPEAL OR IN THE ALTERNATIVE TO AFFIRM

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QUESTIONS PRESENTED

I

Is the legislative call for the constitutional convention which incorporates the Tennessee Constitution, Article IX, Section 1, consistent with First Amendment provisions of the United States Constitution concerning the establishment of religion and the free exercise thereof?

II

Is the legislative call for the constitutional convention which incorporates the Tennessee Constitution, Article IX, Section 1, consistent with the Fourteenth Amendment provisions of the United States Constitution concerning equal protection?

III

Does the legislative call for the constitutional convention which incorporates the Tennessee Constitution, Article IX, Section 1, deny due process of law under the Fourteenth Amendment of the United States Constitution as being vague?

MOTION TO DISMISS OR AFFIRM

Appellee, Selma Cash Paty, moves that the appeal herein taken be dismissed or in the alternative that the decision of the Tennessee Supreme Court in the case of *Paty v. McDaniel*, be affirmed on the ground that the judgment below rests upon the interpretation of the highest appellate court of the State of Tennessee of the Constitution of Tennessee based upon the findings of a legitimate and substantial state interest and that judgment should not be disturbed.

This is an appeal from a decision of the Supreme Court of Tennessee rejecting appellant's contention that his disqualification pursuant to the Tennessee Constitution, Article IX, Section 1, as a delegate to the Tennessee limited Constitutional Convention is a denial of his federal constitutional rights to free exercise of religion, is an establishment of religion in conflict with the First Amendment, is a denial of his right to vote, is a violation of Equal Protection of the Laws, is based upon an unconstitutionally vague law, and subjects him to a religious test in order for him to qualify as a candidate.

I

The appellant contends that Article IX, Section 1 of the Constitution of the State of Tennessee deprives him of the right to the free exercise of religion guaranteed by the First and Fourteenth Amendments to the United States Constitution. The Legislative call, Public Acts 1976, Chapter 848, Section 4, established qualifications for the delegates to the limited constitutional convention the same as those for membership in the Tennessee House of Representatives.

> "SECTION 4. Any citizen of the state who can qualify for member in the House of Representatives of the General Assembly may become a candidate for delegate to the convention upon filing with the County Election Commission of his county a nominating petition containing not less than twenty-five (25) names of legally qualified voters of his or her representative district."

Article IX, Section 1 of the Constitution of Tennessee provides as follows:

> "*Section 1. Ineligibility of ministers and priests to seats in legislature.*—Whereas Ministers of the Gospel are by their profession, dedicated to God and the care of souls, and ought not to be diverted from the great duties of their functions; therefore, no Minister of the Gospel, or priest of any denomination whatever, shall be eligible to a seat in either House of the Legislature."

The basis of the opinion of the Tennessee Supreme Court in *Paty v. McDaniel*, 457 S.W.2d 987, was that service in the legislature is "purely secular activity", and the first premises of this brief is that there is no limitation on the free exercise of religion imposed by Article IX, Section 1. Service in the Tennessee Legislature cannot be considered to be a right to free exercise of religion guaranteed by the First Amendment under

the facts of this case. There is no allegation in the record of this case to indicate that appellant intends now, or ever, to leave his ministry because of his desire to serve as a delegate to the limited constitutional convention or to become at some future time a candidate for a seat in either House of the Tennessee Legislature. By the facts of the case it can be seen that, whatever burden appellant contends is imposed upon his free exercise, it is one that does not compulsively require the abandonment of any of his religious beliefs, which may well include being a minister of his faith but which, in the absence of proof in the record to support the claim, does not include being a convention delegate or member of the Tennessee General Assembly.

This Court has previously stated that "it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion." *School District of Abington Township, Pennsylvania v. Schempp*, 374 U.S. 203. It should be emphasized that if appellant's challenge is to succeed on free exercise grounds, the burden is upon him to show the coercive effect of the law *in his religion*.

Appellant contends in his brief that the Tennessee Constitution, Article IX, Section 1, presents him with a Hobson's choice between being a minister of his chosen faith or a member of the Tennessee Legislature. If the choice exists between a divine calling and a temporal one, his exercise of the option to continue to be a minister would not deny to appellant the right the free exercise of his religious belief, and his exercise of the option to be a political candidate would be the rational, uncoerced choice to leave the ministry in favor of a secular endeavor.

The degree of the burden upon the free exercise of religion should be actual rather than theoretical in order for a First Amendment challenge to be upheld, and the characterization as an "indirect" burden does little to clarify whether the Tennessee Constitution, Article IX, Section 1 is an impermissible burden

under the facts of this case. A definition of "indirect burden" in the context of free exercise clause cases was supplied by Chief Justice Warren in *Braunfeld v. Brown*, 366 US 599, as "legislation which does not make unlawful the religious practice itself." 366 US at 608. There are, admittedly, indirect burdens which have been found to inhibit the free exercise of religion to the extent that the questioned legislation unconstitutionally conflicted with First Amendment rights; however, these successfully challenged state actions were not found to have been sufficiently grounded upon such a compelling state interest as to warrant the inhibition of the exercise of the rights.

Such a case is *Sherbert v. Verner*, 374 U.S. 398, which decided upon free exercise grounds that a Seventh-Day Adventist was not ineligible for benefits under South Carolina's unemployment compensation law because of her unavailability for work on Saturdays. The Court found that conditioning the receipt of benefits upon the "appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties." 374 US at 406. However, this factual situation is not analogous to appellant's case because the exigencies of survival demand that a member of our society have an income whether in the form of earnings or other compensation whereas service in the legislature is a voluntary activity, which involves no element of coercion. The choice between having an income and violating one's religious principles does not present a valid option.

If the Tennessee Supreme Court's decision is to withstand appellant's constitutional challenge, in the words of *Sherbert v. Verner, supra*, it must be either because appellant's disqualification from candidacy is not an infringement by the State of his constitutional rights of free exercise, or "because any incidental burden on the free exercise of appellant's religion must be justified by a compelling state interest in the regulation of a subject within the State's constitutional power to regulate."

374 US at 403. Political candidacy is unquestionably a subject within the state's power to regulate, indeed the Constitution of the United States established certain qualifications for candidates for election to public office. Representatives must be 25 years of age, a citizen for 7 years and an inhabitant of the State from which he or she is chosen. (Article I, Section 2). A senator must be 30 years of age, a citizen for 9 years and an inhabitant of that state. (Article I, Section 3). No person holding any office under the United States may be a member of congress. (Article I, Section 6). Only natural born citizens may serve as President of the United States. (Article II, Section 1).

The Tennessee Supreme Court found that,

> "The effect of Tennessee's constitutional provision prohibiting service in the General Assembly is to advance the State's goal of maintaining the separation between church and state, an imperative, constitutionally equal to the free exercise mandate. In our opinion, it is far higher on the scale of legitimate state goals than the mere convenience of having everyone rest on the same day, which sufficed in *Braunfeld*." *Paty v. McDaniel*, 457 S.W.2d —.

A compelling state interest is to preserve the neutral governmental attitude toward religion which the Establishment Clause was intended to promote. Appellant argues that "no *state* interest in a 'wall of separation' which diminishes *federal* rights of free exercise is compelling." Appellant's Jurisdictional Statement, page 8. The case of *Braunfeld v. Brown*, supra decided precisely otherwise, holding as it did that there was a state interest in having a uniform day of rest in the state sufficiently compelling to permit the enforcement of Sunday closing laws to the admitted detriment of members of religious groups observing a Sabbath day other than Sunday, the religious observance of which is a federally guaranteed right.

On the other hand, in *Sherbert v. Verner*, the Court was not persuaded by the compelling state interest argument that unscrupulous claimants would feign religious objections to Saturday employment in order to avail themselves to the unemployment compensation fund because, in part, the objection had not been made in the state supreme court, and the Court was "unwilling to assess the importance of an asserted state interest without the views of the state court." 374 US at 407. Where, as here done by the Tennessee Supreme Court, the highest court of a state has approved a constitutional provision of that state unchallenged and unaltered for 180 years, its decision should not be disturbed without employing "the most critical scrutiny" in order to avoid radically restricting a state's legislative latitude. *Braunfeld v. Brown, supra.*

A workable test for determining the validity of laws in conflict with the free exercise clause was employed in *Braunfeld v. Brown*,

> "If the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect. But if the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden." 366 US at 607.

It is submitted, and the Tennessee Supreme Court found, that having ministers of any faith serve in the legislature would undermine the "compelling state interest" in perpetuating the First Amendment policy of maintaining the wall of separation of church and state by insuring that members of the legislature are not professionally concerned with an established religion. By inference from the *Paty v. McDaniel* decision, the Tennessee

court found that the nature of the call of a minister is to lead and teach the members of a particular religious group and to foster the precepts and doctrines of that group to which he is primarily devoted.

It is a permissible distinction between members of the ministerial profession and members of any other profession because of the reasonably forseeable conflict between a minister's divinely influenced mandate in the promotion of his religious views and the prohibition of the Establishment Clause. The policy sought to be perpetuated was stated in *Everson v. Board of Education*, 330 U.S. 1, as preserving civil liberty by rescuing "the temporal institutions from religious interference." The dual aspect of the constitutional inhibition in the area of legislation in matters of religion, operating as it does to maintain the wall of separation of church and state, affords self-protection to both institutions.

> "Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa." *Everson v. Board of Education*, 330 U.S. at 16.

It is plain that religious intrusion into the governmental sphere, as observed by this Court in *Abington School District v. Schempp, supra*, would ultimately have the same coercive effect as governmental interference with religion, indirectly compelling religious minorities to conform to the prevailing officially approved religion. Appellant argues that the apprehensions of the Tennessee Court that the candidacy of ministers to the legislative body in the state would result in a political cleavage along religious lines is unwarranted. (Appellant's Jurisdictional Statement, p. 20.) However, this Court has expressed the same type of apprehension concerning the combination of government and religion in *Abington School District v. Schempp, supra*:

> "The wholesome 'neutrality' of which the Court's cases speak this stems from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of governmental and religious functions or a concert or dependency of one upon the other to the end that official support of the State or Federal Government would be placed behind the tenets of one or all of the orthodoxies." 374 U.S. at 222.

In conclusion to the answer of appellee to the contentions that the decree of the Tennessee Supreme Court violates the First Amendment rights of appellant, it is urged that no burden on appellant's right of free exercise has been demonstrated; however, if any burden is found to exist, it is not a "coercive" burden on appellant's rights as they relate to the exercise of his religion. Appellant's claim that this state action is an establishment of religion exists only theoretically, and, likewise, appellant has not demonstrated how rights peculiar to him are adversely affected in respect to an establishment of religion. He is the only party before the Court claiming the infringement of constitutional rights, and the nature of his claim is not based upon a factual circumstance giving rise to any injury to him or an infringement of his fundamental rights by state action in the area of establishment of religion. There is lacking in the basis of appellant's claim "a logical nexus between the status asserted and the claim sought to be adjudicated." *Flast v. Cohen*, 392 U.S. 83, 102.

II

Appellant contends that he has been denied Equal Protection in that he has been deprived of federally secured rights of voting and political candidacy as a result of the decree of the Tennessee Supreme Court. It should not be necessary to treat the questions of voting rights and political candidacy separately in this discussion, inasmuch as appellant's right to vote

for himself, presumably the candidate of his choice, depends upon his right to be a political candidate. The right to vote does not exist in a vacuum. The right to vote is exercisable only in regular elections with candidates qualified according to permissible state standards; therefore, the right of appellant to candidacy in the first place should be the controlling inquiry in this case. The object of appellant's claim that the questioned portion of the Tennessee Constitution is an infringement of his voting rights is to invoke the constitutional protections afforded the right to vote as compared to those protections applicable to the right to participate as a political candidate, the latter right having been correctly characterized as only "emerging". (Appelllant's Jurisdictional Statement, p. 24.)

The prevailing standard for determining the constitutional limits of a state's power over its own elections involves consideration of the "facts and circumstances behind the law, the interest which the state claims to be protecting, and the interest of those who are disadvantaged by the classification." *Williams v. Rhodes*, 393 U.S. 23, 30. The elimination of ministers as candidates for office in the law-making sector of Tennessee government is a permissible classification on the basis that the classification exists for the protection of an important state interest. The maintenance of a government free from the threat of religiously sectarian influence is a fundamental constitutional principal of the First Amendment and an important state interest, the promotion of which possibly involves the infringement to some degree of other valid fundamental rights of individuals.

Where the balancing of these competing state interests and individual rights involves the classification of individual or groups and results in the asserted loss of fundamental rights, certain tests have been formulated to determine if state action violating the Equal Protection Clause is permissible. The application of these tests involves looking to "the character of the classification in question; the individual interests affected by the classification;

and the governmental interests asserted in support of the classification." *Dunn v. Blumstien*, 405 U.S. 330, 335. A compelling state interest must be demonstrated in order for the classification to be constitutionally permissible where it infringes upon a constitutionally protected right, and without regard to whether any less stringent test may be applicable appellee contends that a compelling state interest has been demonstrated. As it has been previously articulated, the state interest in this case is certainly more compelling than in having a uniform day of rest as in *Braunstien v. Brown, supra*.

The maintenance of a secular legislature is a state interest of such magnitude as to distinguish this case from those cited by appellant dealing with filing fees, property requirements or minority parties, where the Court was unable to discern any significant state interest. See, *Lubin v. Panish*, 415 U.S. 709 (state interest eliminating frivolous candidates did not justify filing fee); *Turner v. Fouche*, 396 U.S. 346 (no justifiable state interest in freeholder qualifications for school board elections); *Williams v. Rhodes, supra* (no compelling state interest in restricting the ability of a minority party to gain a position on the ballot). Unlike these immediately preceding cases which involved protection of the rights of freedom of association directly affecting indigents, the arguable infringement in this case applies to a class upon whom it has not been demonstrated to have any substantial impact.

Other cases have found a compelling state interest in legislation dealing with the elective process, acknowledging that "the state's strong interest in maintaining the integrity of the political process" outweighed any restrictions imposed upon the right to vote. *Storer v. Brown*, 415 U.S. 724, 731. In *Jenness v. Fortson*, 403 U.S. 431, for example, the Georgia requirement that independent voters file a nominating petition signed by five percent of the electorate was upheld as reasonably related to the state's interest in the elective process.

The classification of which appellant claims is not an "invidious" one subject to constitutional challenge. The classification of ministers has been the subject of favorable class legislation in other contexts under both the Tennessee State law and under the federal law. One example was the exclusion of ministers from the draft under the Selective Service Act of 1967, 50 U.S.C. Section 456(g):

> "Regular or duly ordained ministers of religion, as defined in this title . . ., and students preparing for the ministry under the direction of recognized churches or religious organizations, who are satisfactorily pursuing full-time courses of instruction in recognized theological or divinity schools, or who are satisfactorily pursuing theological or divinity schools in which they have been pre-enrolled, shall be exempt from training and service (but not from registration—under this title".

Ministers have also been given specific exemptions from taxation for certain types of income.

> 26 U.S.C.A. § 107. *Rental value of parsonages* in the case of a minister of the gospel, gross income does not include—
>
> (1) the rental value of a home furnished to him as part of his compensation: or
>
> (2) the rental allowance paid to him as part of his compensation, to the extent used by him to rent or provide a home.
>
> 26 U.S.C.A. § 1402. (a) *Net earnings from self-employment.*—The term 'net earnings from self-employment' means the gross income derived by an individual from any trade or business carried on by such individual . . . except . . . (8) an individual who is duly ordained, commissioned, or licensed minister of a church or a member

> of a religious order shall compute his net earnings from self-employment derived from the performance of service described in subsection (c) (4) without regard to Section 107 (relating to rental value of parsonages), Section 119 (relating to meals and lodging furnished for the convenience of the employer), Section 911 (relating to earned income from sources without the United States), and Section 931 (relating to income from sources within possessions of the United States).
>
> 26 U.S.C.A. § 3401. (a) *Wages.*—For purposes of this chapter, the term 'wages' means all remuneration . . . for services performed by an employee for his employer, . . . except that such term shall not include remuneration paid —
>
> (9) for services performed by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order;

It is submitted that if a classification of ministers is not unconstitutionally arbitrary or invidious for the purpose of the statutes cited above, then that classification does not violate the Equal Protection Clause as applied to the Tennessee Constitution. Nor, is this arbitrary class legislation any more than the preventing a federal judge from being a member of the United States Congress under the United States Constitution, Article I, Section 6, is arbitrary class legislation. There is, of course, a legitimate and compelling state interest in maintaining the separation of powers by barring judges from service in the legislature, but this does not rank higher on the scale of legitimate state interests than separation of church and state.

III

Appellant raises a challenge to the decision below on the basis that the words "minister" and "priest" in the Tennessee Constitution, Article IX, Section 1, are unconstitutionally vague. As demonstrated by the Internal Revenue Code, the federal government has had no difficulty with the definition, and this terminology has not proven to be judicially unmanageable in the past.

Appellant demonstrates the vagueness by application of Article IX, Section 1, to situations which do not apply to a duly ordained and regularly functioning Baptist preacher. Such arbitrary and hypothetical applications of the constitutional provision are of intellectual interest only and are evasive of the issue of whether the section applies in the present situation. As this Court stated in *Harris County Commissioners Court v. Moore*, 420 U.S. 77, 86 fn. 9, "it is not the sort of vagueness that leaves those subject to a statute uncertain about what is required of them." The Court further stated that "[i]n the case where applicability of the statute is uncertain, abstension is proper." *Id.*

In light of the fact that appellant's argument involves the application of Article IX, Section 1, and not its effect, it should be assumed that the Tennessee courts are able to define the term and to determine applicability as it relates to actual cases where the definition of the terms relate to real issues rather than to hypothetical situations. The Tennessee courts are certainly as equal to the task as the federal courts have been in construing the term "ministers" in such cases, for example, as *Dickinson v. United States*, 346 U.S. 389, and *Cox v. United States*, 332 U.S. 442.

IV

This Court should find that the Tennessee Constitution, Article IX, Section 1, as free from constitutional infirmities, thereby permitting the State of Tennessee to promote in its own manner the goal of maintaining the wall of separation of church and state. Whether, in comparison with alternative means of promoting that state interest, this is the wisest means available should not be the scale by which this law is to be measured. For, as this Court states in *Braunfeld v. Brown, supra*, "our concern is not with the wisdom of legislation but with its constitutional limitations." 366 U.S. at 608.

Respectfully submitted,

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Certificate of Service

Copies of this Motion of Appellee, Selma Cash Paty, to Dismiss Appeal or in the Alternative to Affirm have been served upon The Honorable Brooks McLemore, Attorney General of the State of Tennessee, Kenneth R. Herrell, Assistant Attorney General of Tennessee, counsel for appellees and upon Frederic S. LeClercq, and J. Thomas Mann, counsel for appellants by placing same in the United States mail with sufficient postage directed to their respective office addresses on this 13th day of June, 1977.

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